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No. 98-1695

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENTS CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF

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RESPONDENTS CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF

Petitioner Prudential Insurance Company of America has submitted a Supplemental Memorandum purporting to "call[] attention to [a] new case" under Rule 15.8. The "new matter" that Prudential alleges is this Court's decision in *Ortiz v. Fibreboard Corp.*, __ U.S. __ (No. 97-1704) (June 23, 1999). Prudential asserts that the "decision in *Fibreboard* reenforces several of the grounds for granting plenary review in this case." Supp. Memo. at 1.

But except for the fact that *Fibreboard* is a class action case, *Fibreboard* has nothing whatsoever to do with either the underlying facts or law or the purported Questions Presented here. *Fibreboard* therefore does nothing to cure the fatal deficiencies of Prudential's ill-conceived Petition. Unmasked, Prudential's Supplemental Memorandum is an abuse of Rule 15.8 and an impermissible vehicle to reargue old matters already presented in Prudential's Petition and Reply.

Respondents Class Plaintiffs tender this Supplemental Brief pursuant to Rule 15.8 to answer and correct Prudential's improper and misleading Supplemental Memorandum. The sharp contrasts between *Fibreboard* and this case show that Prudential's claim of "new matter" in *Fibreboard* that "reenforces" its Petition is frivolous.

First: *Fibreboard* involved a mandatory settlement class action under the Federal Rules of Civil Procedure filed solely for the purpose of implementing a global deal between a class of asbestos personal injury victims and a corporate defendant and its insurers. The instant state-court action, however, was a decade-long litigation war begun in 1986 between a class of commercial building-owner plaintiffs and 28 solvent defendant manufacturers of asbestos-containing building products.

Respondents United States Gypsum Company and W.R. Grace & Co.-Conn. and two other defendants refused to join the 24 others in the first group of settlements approved in 1995. These remaining defendants continued to fight and prepare for trial. As trial approached, they finally decided to settle with the class. By contrast to *Fibreboard*, adversity was the signature of this case.

Second: *Fibreboard* involved an alleged "limited fund" class action certified under Rule 23(b)(1)(B), Fed. R. Civ. P. The asbestos manufacturer and its insurers claimed there were insufficient funds in the form of assets and coverage to defend all asbestos personal injury claims and satisfy the successful ones. Class counsel never disputed this claim. Instead, the settling parties all argued the presence of "an early feast . . . later famine" risk that Rule 23(b)(1)(B) could properly be used to resolve. *See* slip op. at 20. Objectors, however, presented a veritable steeplechase of constitutional and statutory hurdles to the use of a federal procedural rule to shoehorn thousands of present and future personal injury choses in action held by absent class members into a single-shot *in rem* proceeding on the "equity" side of a federal court. In addition to the intra-class conflicts thus created, objectors also pointed to the sharp conflict engendered by Fibreboard's resolution of 45,000 "inventory" cases outside the class on substantially better terms–and contingent as well upon either an approved global settlement or success in the coverage dispute–as an apparent *quid pro quo* for class counsel's signing on to the class action settlement.

By contrast, there is here no such unprecedented, conflict-ridden use of federal Rule 23(b)(1)(B) to settle mass tort personal injury damage claims.[1] This is an opt-out class action under the

1. This Court observed in *Fibreboard*:

> Although . . . the revised text [of Rule 23] adopted in 1966 was understood (somewhat cautiously) to authorize the

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Pennsylvania Rules of Civil Procedure that was certified for trial, as were several similar asbestos property-damage class actions in other courts. On the eve of trial, litigation adversaries negotiated a compromise without any pressure or threat that a successful judgment against the Trial Class defendants would result in their insolvency. There were no intra-class conflicts, nor any suspiciously more favorable "sidebar" deals for non-class claimants. As a result, *not a single objection to the Trial Class settlement was raised at the fairness hearing by Prudential or any other of the thousands of class members/owners.*

Third: *Fibreboard* involved a mandatory, non-opt out class. Absent class members had no right to receive notice and to exclude themselves from class membership. Slip op. at 15 n.13. Under that compulsion, their choses in action would be extinguished and subjected to an equitable "haircut." As a result, this Court demanded close adherence to the historical characteristics of the "limited fund" class action device as presumptively necessary protections for the locked-in class. *See* Slip op. at 23, 30-44.

By contrast, Prudential's and all other class members' constitutional rights and choices were fully preserved here. Two successive classwide notices were mailed to the addresses shown by the property owners, like Prudential, on their respective leases with the federal government.[2] Class members were given a

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> courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see *supra*, at 24-25.

Slip op. at 44.

2. Prudential continues to insist that this case "frames important practical questions about defining generic contours" of due process

(Cont'd)

choice to opt out to the tort system or remain in the classes. They were clearly advised of the consequences if they did not opt out in time: their choses in action, even if pending, would be compromised and extinguished by the settlement.[3] By contrast to the coercive limited fund treatment of class members in *Fibreboard*, notice and freedom of choice for the class were the hallmarks of this case.

Fourth: In *Fibreboard*, this Court's holding was directed at two issues. First, could the "limited" nature of the fund be

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notice to the class, and to complain of "palpable defects in the notice process." Supp. Memo. at 4. But Prudential's notice argument founders on its own premise that constitutionally adequate notice is notice "such as one desirous of actually informing the absentee [class member] might reasonably adopt." Reply Brief at 3, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Prudential has not and cannot rationally explain why *Mullane* is not satisfied here by class counsel's reliance on the notice provision and address that *Prudential itself* bargained for in its property leases with the federal government, the use of which to deliver the class notice provided *five actual notices of the Trial Class settlement* to Prudential at its respective properties' addresses.

3. Prudential repeats the falsehood that "36,000 claims" were settled "for an average of $125 . . . ." Supp. Memo. at 3. *See also* Petition at *i*; Reply at 6 n.5. Had Prudential bothered to cite the facts, it would have disclosed that roughly 80% of the some 36,000 buildings are small, rural post offices, and that the claims verification and distribution procedures have not yet taken place. Although the thousands of owners of the 36,000 federally-leased buildings were notified, the hallmark of the *class* is an owner's federally-leased building in which "asbestos or asbestos-containing materials *were present*." Petition at 4a (emphasis added). Thus, eligibility for a claim against the settlement fund will require proof of both the presence of asbestos within the ten-year class period and the claimant's asbestos abatement expenditures. It is likely that only a fraction of the 36,000 buildings actually contained asbestos, of which an even smaller number will have been proven to have had that asbestos abated at the claimant owner's cost.

determined solely by the parties' settlement agreement? Second, was the fund allocated to the class claimants "by a process addressing any conflicting interests of class members"? Slip op. at 1. Reversing, this Court answered both questions in the negative; and in *dicta* it seriously questioned the fairness of a limited fund settlement with a corporate defendant that "was allowed to retain virtually its entire net worth." Slip op. at 42. By contrast, neither of the two purported Questions Presented by the instant Petition is even remotely related to the *Fibreboard* holdings.

The foregoing contrasts between *Fibreboard* and this case do more than demonstrate the absence of "new matter" in *Fibreboard* in relation to this case. In fact, they serve to highlight the fatal weaknesses of Prudential's Petition:

Prudential, entitled to the best practicable notice, received more. Prudential received actual notice at the very addresses specified for notice in its building leases.

Prudential, entitled to opt out by timely written exclusion, apparently decided it would opt out and then (either intentionally or unintentionally) did not submit a timely exclusion.

Prudential, entitled (if it chose to remain in the class) to contest the Trial Class settlement on any appropriate ground, including a claim of inadequate representation by counsel, elected not to appear at the fairness hearing. Instead, alleging an inadvertent, excusable failure to opt out, Prudential sought permission to do so late in a petition for post-judgment relief, and it elected not to advance or support by appropriate procedure an alternative claim based upon alleged constitutional inadequacy of counsel.[4]

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4. Prudential now asserts, falsely, that "class counsel . . . conceded below that *they had done nothing* to investigate or evaluate the claims

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Armed at each of these stages with a panoply of rights as a class member and as prosecutor of its own causes of action, Prudential chose freely with the aid of sophisticated counsel. Upon careful review at each stage of the proceedings, the lower courts properly held Prudential bound by its choices.

These immutable and salient facts make *Fibreboard* beside the point here. The Petition is and remains devoid of merit and must be denied.

Respectfully submitted,

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of class members like Prudential." Supp. Memo. at 3 (original emphasis). However, Prudential's opening brief contradicts this latest misrepresentation. *See, e.g.*, Petition at 5, 8. No such concession exists on this record, nor could it, because the opposite is true concerning class counsel's substantial overall efforts in investigation, discovery, and estimation of defendants' liability and the magnitude of the class' claims in the aggregate. Insofar as class counsel's absence of knowledge about Prudential's federal lawsuit, it is immaterial here. The trial court specifically found that "even if plaintiffs' counsel and/or this Court had known of Pru's Newark lawsuits (which they did not) on July 24, 1996, it would not have caused us to reject the settlements on the ground of inadequacy." Petition at 52a.